

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-4204

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U.S. COURT OF APPEALS
SECOND CIRCUIT

In The
United States Court of Appeals
For The Second Circuit

TIM LOK,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals.

B
H/S

APPENDIX FOR PETITIONER

SCHIANO & WALLENSTEIN

Attorneys for Petitioner

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New York, New York 10005

(212) 747-0090

STANLEY H. WALLENSTEIN
Of Counsel

(10115)

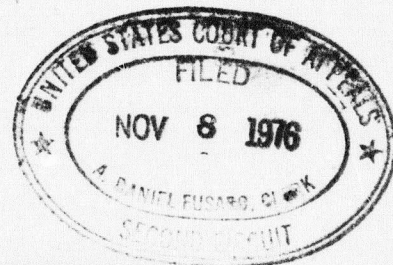
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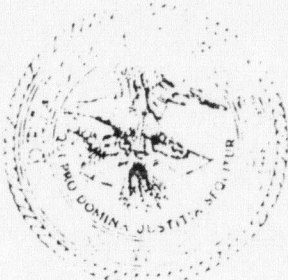


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DECISION OF THE BOARD OF IMMIGRATION APPEALS A-1
DATED JULY 30, 1976 (pp. A-1-3)



United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A31 327 663 - New York

JUL 30 1976

In re: TIM LOK

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Max K. Schlem, Esquire
223 Broadway
New York, N. Y. 10007

ON BEHALF OF I&N SERVICE: George Indalicate
Appellate Trial Attorney

ORAL ARGUMENT: February 24, 1976

CHARGES:

Order: Sec. 241(a)(11), I&N Act (8 U.S.C. 1251
(a)(11)) - Convicted of conspiracy
for violation of narcotics laws;
possession of narcotics with intent
to distribute heroin. U.S. Code
Title 21, sections 812, 841(a)(1),
841(b)(1)(A); Title 18, U.S. Code
section 2

APPLICATION: A waiver of inadmissibility under section
212(c) of the Immigration and Nationality
Act and termination of proceedings

In a decision dated May 29, 1975, the immigration judge
found the respondent deportable under section 241(a)(11)
of the Immigration and Nationality Act, denied his appli-

A31 327 663

cation for a waiver of inadmissibility under section 212(c) and ordered his deportation. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent, a native and citizen of China, entered the United States as a nonimmigrant crewman in 1959. He remained beyond the authorized period of his admission and, after a hearing before a special inquiry officer on October 26, 1965, was found deportable under section 241 (a)(2) of the Act and was granted the privilege of departing voluntarily. An alternate order of deportation was then entered against him. Private bills were subsequently introduced in Congress in his behalf and, as a result, he was given until March 2, 1969 to depart the United States voluntarily. He did not leave, however, until October 25, 1971. Shortly thereafter, on December 26, 1971, after having received permission to re-apply for admission, he returned to the United States as a lawful permanent resident. In 1973 he was convicted upon a plea of guilty of offenses relating to the possession and distribution of narcotic drugs, to wit, heroin, and these proceedings were instituted against him.

At the deportation hearing the respondent admitted the truth of the allegations in the Order to Show Cause and conceded his deportability. The only issue on appeal involves his application for a waiver of inadmissibility under section 212(c).

Section 212(c) provides in pertinent part:

"Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a)."
(Emphasis supplied.)

Although the language of the statute describes a waiver to an alien seeking to enter the United States, we have held that this waiver may be granted in deportation proceedings in connection with an application for adjustment of status. Matter of Smith, 11 I&N Dec. 325 (BIA 1965).

The seven-year period of domicile in the United States, however, must have followed the lawful admission for permanent residence. Matter of S-, 5 I&N Dec. 116 (BIA 1953). Inasmuch as the respondent was not admitted as a lawful permanent resident until 1971, he does not have the requisite seven years and is consequently statutorily ineligible for section 212(c) relief.

The decision of the immigration judge is correct. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

INS FORM 171, NOTICE OF APPROVAL OF IMMIGRANT
VISA PETITION
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
New York, New York

A-4

NOTICE OF APPROVAL OR REVALIDATION OF IMMIGRANT VISA PETITION

NAME AND ADDRESS OF PETITIONER

Mrs. Wai Chan Lok
9 Division Street Apt. 300
New York, New York 10002

NAME OF BENEFICIARY

Tim Lok

CLASSIFICATION

201(b)

FILE NO.

15 955 961

DATE PETITION FILED

2-3-69

DATE OF APPROVAL
OF PETITION

1-30-70

VALIDITY: Petition approved for relative is valid for duration of relationship to petitioner and status established in petition. If petition is for a person in the professions, arts or sciences, or an employee, the approval is valid to _____.

Please note the items below which are indicated by "X" marks concerning the visa petition filed by you in behalf of the above beneficiary:

- ☒ YOUR PETITION TO CLASSIFY THE BENEFICIARY AS AN IMMEDIATE RELATIVE OF A UNITED STATES CITIZEN HAS BEEN APPROVED AND FORWARDED TO THE UNITED STATES CONSULATE AT Hong Kong, B.C.C.. THIS COMPLETES ALL ACTION BY THIS SERVICE ON THE PETITION. THE UNITED STATES CONSULATE, WHICH IS UNDER THE SUPERVISION OF THE DEPARTMENT OF STATE, WILL ADVISE THE BENEFICIARY CONCERNING VISA ISSUANCE. *Inquiry concerning visa issuance should be addressed to the consul. This service will be unable to answer any inquiry concerning visa issuance.*
- ☐ IF YOU BECOME NATURALIZED AS A CITIZEN OF THE UNITED STATES AND AN IMMIGRANT VISA HAS NOT YET BEEN ISSUED TO THE BENEFICIARY, NOT BY THIS OFFICE IMMEDIATELY, GIVING THE DATE OF YOUR NATURALIZATION, AT THE SAME TIME, IF THE PETITION WAS IN BEHALF OF YOUR SON OR DAUGHTER, ALSO ADVISE WHETHER THAT PERSON IS STILL UNMARRIED. THIS INFORMATION MAY EXPEDITE THE ISSUANCE OF A VISA TO THE BENEFICIARY.
- ☐ YOUR PETITION FOR PREFERENCE CLASSIFICATION, AS SHOWN ABOVE, HAS BEEN APPROVED BY THE SERVICE AND FORWARDED TO THE UNITED STATES CONSULATE AT _____. THIS COMPLETES ALL ACTION BY THIS SERVICE ON THE PETITION. THIS SERVICE HAS NOTHING TO DO WITH THE ACTUAL ISSUANCE OF VISAS. VISAS ARE ISSUED ONLY BY A UNITED STATES CONSUL WHO IS UNDER THE JURISDICTION OF THE U.S. DEPARTMENT OF STATE. UNDER THE LAW ONLY A LIMITED NUMBER OF VISAS MAY BE ISSUED BY THAT DEPARTMENT DURING EACH YEAR AND THEY MUST BE ISSUED STRICTLY IN THE CHRONOLOGICAL ORDER IN WHICH PETITIONS WERE FILED FOR THE SAME CLASSIFICATION. WHEN THE BENEFICIARY'S TURN IS REACHED ON THE VISA WAITING LIST, THE UNITED STATES CONSUL WILL INFORM HIM AND CONSIDER ISSUANCE OF THE VISA. *Inquiry concerning visa issuance should be addressed to the consul. This service will be unable to answer any inquiry concerning visa issuance.*
- ☐ THE PETITION HAS BEEN APPROVED. THE PETITION STATES THAT THE BENEFICIARY IS IN THE UNITED STATES AND WILL APPLY TO BECOME A LAWFUL PERMANENT RESIDENT. THE ENCLOSED APPLICATION FOR THIS PURPOSE (FORM I-485) SHOULD BE COMPLETED AND SUBMITTED BY THE BENEFICIARY IN ACCORDANCE WITH THE INSTRUCTIONS CONTAINED THEREIN. (IF THE BENEFICIARY HAD PREVIOUSLY SUBMITTED FORM I-485 WHICH WAS RETURNED TO HIM, HE SHOULD RESUBMIT THAT FORM.)
- ☐ THE PETITION HAS BEEN APPROVED. THE BENEFICIARY WILL BE INFORMED OF THE DECISION MADE ON HIS PENDING APPLICATION TO BECOME A LAWFUL PERMANENT RESIDENT (FORM I-485).
- ☐ THE PETITION HAS BEEN APPROVED. THE PETITION STATES THAT THE BENEFICIARY IS IN THE UNITED STATES AND WILL APPLY TO BECOME A LAWFUL PERMANENT RESIDENT. HOWEVER, AN IMMIGRANT VISA NUMBER IS NOT PRESENTLY AVAILABLE. THEREFORE, THE BENEFICIARY MAY NOT APPLY TO BECOME A PERMANENT RESIDENT.
- ☐ THE PETITION HAS BEEN REVALIDATED AND FORWARDED TO THE UNITED STATES CONSULATE AT WHICH THE BENEFICIARY WILL APPLY FOR A VISA. ANY INQUIRY CONCERNING THE ISSUANCE OF A VISA SHOULD BE DIRECTED TO THE CONSULATE AT _____. *This service will be unable to answer any inquiry concerning visa issuance.*
- ☐ THE PETITION HAS BEEN REVALIDATED. NO NOTICE OF REVALIDATION OF THE PETITION HAS BEEN SENT TO A UNITED STATES CONSULATE AS IT HAS BEEN INDICATED THAT THE BENEFICIARY IS APPLYING TO BECOME A LAWFUL PERMANENT RESIDENT.
- ☐ REMARKS: cc: Cene Loy Chu
9 Division Street
New York, New York 10002
- ☐ DOCUMENTS WHICH YOU SUBMITTED IN SUPPORT OF YOUR PETITION HAVE SERVED OUR PURPOSE AND ARE RETURNED.

VERY TRULY YOURS,

T.C. GIBNEY, DEPUTY DISTRICT DIRECTOR
DISTRICT DIRECTOR

Form 1-171

(Rev. 5-1-69)

THIS COPY TO BE MAILED TO THE ATTORNEY OR REPRESENTATIVE, IF ANY



LETTER FROM CONSULATE GENERAL IN HONG KONG TO
PETITIONER, DATED APRIL 16, 1970
CONSULATE GENERAL

A-5

OF THE
UNITED STATES OF AMERICA
Hong Kong, B, C, C.

April 16, 1970

Mr. Tim Lok
c/o Mr. Gene Loy Chu
Attorney at Law
9, Division Street
New York, N.Y. 10002

Sir/Madam:

It has been noted ~~from the Form FS-497A submitted to this office~~
that you entered the United States

- ☒ as a crewman,
☐ to join a vessel as a crewman,
☐ in transit without a visa.

The Immigration and Naturalization Service has requested that in all such cases the status in the United States of the visa applicant be verified through the office of that Service having jurisdiction over the area in which the applicant is residing.

You should therefore present this letter and Form FS-497A to that office of the Immigration Service for verification of your status in the United States. The report will be returned directly to this office.

Although you should also take the steps indicated in the other enclosures to establish your entitlement to an immigrant classification (if you have not already done so), this office will not be able to take further steps to process your visa case until we hear from the Immigration and Naturalization Service.

Very truly yours,

Sumner Karp
American Consul

HNK-107

1-23-70

(CA-147, 1-13-70)

Mr. Chu
Docs - VP. and copy
of his form, endorsed as
requested, sent Hong Kong today
I-94 and I-55
Subject returned to
Action. He should
surrender I-94 at time
of departure.
W. H. Cook
8/10/70

LETTER FROM CONSULATE GENERAL IN HONG KONG TO
PETITIONER'S ATTORNEY DATED MAY 24, 1971
CONSULATE GENERAL (A-6-A-7)
OF THE
UNITED STATES OF AMERICA
Hong Kong, B. C. C.

A-6



In reply refer to
1V

May 24, 1971

Mr. Gene Loy Chu
Attorney at Law
9 Division Street
New York, New York 10002

Dear Sir or Madam:

I refer to your letter of May 14, 1971 concerning the
immigrant visa case of Tim LOK.

The status of this case is indicated by the paragraphs checked below:

- ☐ 1. Enclosed for your information is Form DSL-852 concerning visa applications. We will be able to take action in this case only if the applicant is the beneficiary of an approved visa petition which confers immediate relative or preference status, as described in the enclosed form.
- ☐ 2. This office has not yet received a petition in behalf of the named applicant. You are assured that upon its receipt the applicant will be informed of the necessary steps to take to complete an application for an immigrant visa.
- ☐ 3. Awaiting the receipt of completed application forms which have been sent to the applicant. Upon their receipt an initial interview will be scheduled. Prior to or at this interview the evidence outlined in 4 below should be submitted.
- ☐ 4. Awaiting receipt of the following:
 - a) Evidence of the applicant's identity over a significant period of his or her life and of the composition of his or her family. (See enclosed form HNK-6)
 - b) Evidence of the applicant's relationship to the petitioner. (See enclosed form HNK-6)
 - c) Evidence of support in the United States. (See enclosed form HNK-5)
 - d) Statutory Declaration, in duplicate, in lieu of a birth certificate.
- ☐ 5. Awaiting the completion of local inquiries to determine the eligibility of the applicant for a visa.

See over

☐ 6. Awaiting the receipt of related immigration files to

- a) assist in establishing the applicant's identity and relationship to the petitioner, or
- b) determine the applicant's eligibility to apply for a visa.

☐ 7. The applicant has been scheduled for an appointment with a consular officer. At that time the case will be carefully reviewed and the applicant informed of the status of the application.

☐ 8. Awaiting the completion of the required medical examination. If the results of the examination are satisfactory, and no unforeseen developments occur, the visa will be issued promptly.

☐ 9. Recent efforts to contact the subject at

have been unsuccessful. Please inform us of the current address.

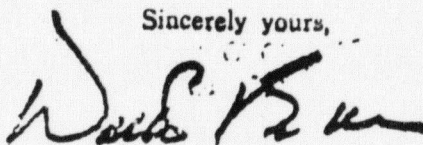
☐ 10. We have been unable to locate a file for the person(s) mentioned in your communication. If you will provide the name of the applicant and of the petitioner, with all possible variations in spelling, any aliases which they may have used, and, if possible, their names in Chinese characters, we will make a further search of our records.

☐ 11. The applicant is the beneficiary of an approved visa petition filed on _____ according to _____ preference status under the numerical limitation for _____. Visa numbers are not presently available to applicants entitled to this preference whose petitions were filed later than _____. We are therefore unable to take action in this case at this time. We will contact the applicant as soon as his/her turn for active processing is reached. It is not necessary to communicate with this office except to report a change of address or marital status.

☐ 12. The visa petition in this case has expired. It has been returned for possible revalidation to the office of the Immigration and Naturalization Service which originally approved it.

☒ 13. The applicant should communicate with this office as soon as he returns to Hong Kong so that we may be able to schedule him for an appointment with a consular officer. The required statutory declaration should be executed after he has returned to Hong Kong. There will be sufficient time for him to secure this document.

Sincerely yours,



Walter Burke
American Consul

COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIM LOK,

Petitioner- Appellant,

- against -

UNITED STATES OF AMERICA,
Respondent- Appellee, .

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Eugene L. St. Louis

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at

1235 Plane Street, Union, N.J. 07083

That on the 5th day of November 1976, deponent served the annexed

Appendix

upon Robert B. Fiske Jr.

attorney(s) for

Respondent- Appellee

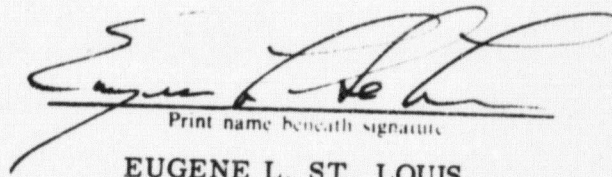
in this action, at One St. Andrews Plaza, New York, New York

the address designated by said attorney(s) for that
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this 5th
day of November 19 76



BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978


Print name beneath signature

EUGENE L. ST. LOUIS